

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

B
PMS.

75-1114

To be argued by
E. THOMAS BOYLE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

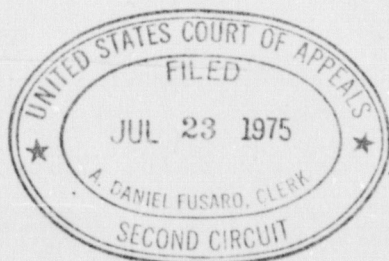
GARY SINGLETON, WILLIAM M. KIRBY,
and WILLIAM ELMORE,

Appellants.

Docket No. 75-1114

APPENDIX TO THE BRIEF
FOR APPELLANT ELMORE

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
WILLIAM ELMORE
FEDERAL DEFENDER SERVICES UNIT
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Foley Square
New York, New York 10007
(212) 732-2971

E. THOMAS BOYLE,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

BART.

CRIMINAL DOCKET

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: SCHEERIN
VS.	
GARY SINGLETON; WILLIAM M. KIRBY (S. L.) and WILLIAM ELMORE	CLOSED
	For Defendant: Kirby:
	Court assigned couns Harry Blum
	130 Clinton St., Bk
	TR 5-1102
Theft of mail (stolen U.S. Checks)	

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	
Fine,		2/2/74	Notice of Appeal (no fee)		
Clerk,			(Elmore)		
Marshal,		5/29/75	Notice of appeal (NO FEE)		
Attorney,			(SINGLETON)		
Commissioner's Court,		5-30-75	Notice of Appeal (no fee)		
Witnesses,			deft Kirby		

DATE	PROCEEDINGS
11-14-74	Before WEINSTEIN J - Indictment filed.
11-21-74	Letter filed dated Nov. 19, 1974 received from Chambers from Edward Malz, Esq. re deft Gary Singleton.
11-22-74	Before BARTELS J - case called - adjd to Nov. 25, 1974 (for pleadi
11-25-74	Before BARTELS J - case called - defts & atty Edward Maltz present - defts enter pleas of not guilty - bail contd.
12/6/74	Notice of readiness for trial filed
1/2/75	Notice of motion for inspection of Grand Jury minutes ret. 1/13/75
1-6-75	Govts affidavit in opposition to motion for inspection of Grand Jury minutes filed.
1/9/75	Notice of motion to dismiss, etc. filed ret. 1/13/75 (SINGLETON)
1/13/75	Before BARTELS J. - Case called - Defts and counsel present - Hearing

040A 12

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
	to suppress ordered and begun-Defts' motion to suppress denied- Hearing concluded-Trial ordered and begun-Trial contd to 1/14/75 at 10:00 A.M.		
1-14-75	Before BARTELS J - case called - defts present with attys - trial continued - Defts move for dismissal of the indictment - motions denied (all 3 defts) Trial contd to Jan. 15, 1975 at 10:00 am.		
1-15-75	By Bartels J - Order of Sustenance filed. (recvd in Clerk's office 2-21-1/15/75		
1/15/75	Before BARTELS, J.- Case called- Defts and counsel present- Trial resumed Defts move for directed verdict of acquittal-denied- Marshals sworn-Jury retires to deliberate- Jury returns with a verdict of guilty as to all defts- Jury polled- Trial concluded- Bail contd		
2/24/75	Voucher for expert services filed (court stenographers)		
3/14/75	Before BARTELS, J.- Case called- Deft KIRBY not present- On motion of deft counsel sentence adjd to 3/21/75 at 9:30 A.M.- Deft ELMORE and counsel pr in lieu of definite sentence deft sentenced pursuant to the provisions of the Y.C.A.- T-18, U.S.C. Sec. 5010(b) until discharged by the Yoth Correction Division- deft to surrender on 4/1/75 at 10:00 A.M.- Deft SINGLETON committed for an examination pursuant to the provisions of the Narcotic Addict Rehabilitation Act of 1956, T-18, U.S.C. Sec. 4252, and sentence is postponed until the Atty General makes his report to the Court of the results of such examination and his recommendations		
3/14/75	Judgments and Commitments filed- certified copies to Marshal (SINGLETON and ELMORE)		
3-18-75	Certified copy of Judgment & Commitment ret'd and filed - deft Singleton delivered to Federal Det. Headquarters.		
3-21-75	Before BARTELS J - case called - deft Kirby & counsel present - deft is sentenced for examination pursuant to the provisions of the Narcotic Addict Rehabilitation Act of 1966, T-18, U.S.C. Sec. 4252 and sentence is ordered postponed until the Atty. General makes his report to the Court of such examination and his recommendations.		
3-21-75	Judgment & Commitment filed - certified copies to Marshal (KIRBY)		
3-21-75	Notice of Appeal filed (ELMORE) without fee.		
3-21-75	Docket entries and duplicate of Notice of Appeal mailed to Court of Appeals (ELMORE)		
3-25-75	Certified copy of Judgment & Commitment ret'd and filed - deft. delivered to Fed. Detention Headquarters. (KIRBY)		
3/31/75	Stenographers Transcript dated 1/13/75 and 1/14/75 filed		
4/2/75	Certified copy of Judgment and Commitment ret'd and filed- deft delivered to Federal Detention Headquarters (ELMORE)		
4-3-75	Certified copy of Judgment & Commitment ret'd and filed - deft Singleton delivered to F.C.I. Milan, Michigan		

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
NOV 14 1974

UNITED STATES OF AMERICA

-against-

GARY SINGLETON, WILLIAM M. KIRBY
and WILLIAM ELMORE,

Defendants.

SUPERSEDING
INDICTMENT

Cr. No.
(T.18, U.S.C., §1708
and §2)

74CR 712

THE GRAND JURY CHARGES:

On or about the 17th day of June 1974, within the
Eastern District of New York, the defendant GARY SINGLETON,
the defendant WILLIAM M. KIRBY and the defendant WILLIAM
ELMORE did unlawfully have in their possession the following:

1. American Express Travelers Check No.
FB68-475-370
payable to Lawrence Reed.
2. State of New York check No. 42554393
payable to Samuels E L&E H
130 46-145th Street
South Ozone Park, NY 11436.
3. State of New York check No. 98630020
payable to G.M. Conner
133 11-145th Street
S. Ozone Pk., N.Y. 11436.
4. State of New York check No. 42578747
payable to Lewis-S&E
126 22-145th Street
South Ozone Park, N.Y. 11436.

which were the contents of letters stolen from the United
States Mail, the defendants knowing the same to have been stolen.
(Title 18, United States Code, Section 1708 and Section 2.)

A TRUE BILL.

August H. Hassenbaum
FOREMAN

1
2 THE COURT: Members of the jury:

3 You have listened most attentively
4 to the testimony and to the summations.
5 The testimony presented the facts through
6 witnesses and exhibits. The summations pre-
7 sented the arguments of the attorneys, pro
8 and con, concerning those facts.

9 The time has come for you and me to
10 perform our respective functions in the trial
11 of this case. You have been very patient.
12 You have heard the voices of the attorneys and
13 the Court and now your voice will be heard.

14 At the beginning, I wish to extend to
15 you my deep appreciation for your attentiveness
16 and your alertness during the course of this
17 trial, and particularly to express my gratitude
18 for the sacrifice each and every one of you has
19 made in neglecting your business and your per-
20 sonal affairs to see that the ends of justice
21 might be accomplished. You have been most
22 tolerant of the unavoidable delays and exceed-
23 ingly interested in your task.

24 Every criminal prosecution is important
25 to the Government of the United States, and it

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2 is equally important to the defendants on
3 trial. Each is entitled to equal justice at
4 your hands.

5 From my experience, justice is best
6 dispensed in a calm, patient, careful and
7 deliberate manner, and I sincerely request
8 you to keep that attitude throughout your
9 deliberations when you go into your jury room.
10 Of course, you should always respect the
11 viewpoints of your fellow-jurors. You should
12 talk to each other with consideration and
13 intelligence and decide the issues in this
14 case on the merits and on the merits alone.

15 You have heard the evidence and the
16 arguments of counsel and it now becomes my duty
17 to give you the law governing this case. It is
18 your duty to accept the law as it is given to
19 you by the Court and to determine the facts of
20 the case for yourselves. The proper application
21 of the law of the case to the facts of the case,
22 as you find them, determines your verdict.

23 I wish to make it very plain to you
24 that the sole responsibility and the sole power
25 in determining the facts are with you, and

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2 anything that I may say, or seem to say, as
3 indicating any view or opinion as to the
4 facts is to be ignored by you.

5 In determining the facts, you should
6 not be influenced by any rulings that the Court
7 may have made during the trial. Those rulings
8 dealt with matters of law and not questions
9 of fact.

10 The Court's ruling on objection made
11 by any of the attorneys and any questions which
12 the Court posed to any witness are not to be
13 considered by you as indicating either the
14 guilt or innocence of the defendants. The same
15 is true with respect to any inflection of the
16 Court's voice relative to any such matters,
17 or in connection with any comments or state-
18 ments the Court may have made to any of the
19 attorneys.

20 The Court expresses no opinion as to
21 the guilt or innocence of the defendants. The
22 determination of such guilt or innocence is a
23 matter that rests exclusively with you.

24 There are some general principles of
25 law which are of importance in every criminal

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2 case, and I wish, first, to make some state-
3 ments which apply to criminal cases in general;
4 after which I shall endeavor to make clear to
5 you what this particular case involves.

6 It is an established principle that
7 an indictment is but a formal method of
8 accusing a defendant of a crime. It is not
9 evidence of any kind against the accused, and
10 does not create any presumption or permit any
11 inference of guilt against any of these defendants.

12 It is also a principle well recognized
13 in law that every person who is charged with the
14 commission of a crime is presumed to be innocent,
15 and the burden rests on the Government to prove
16 to your satisfaction beyond a reasonable doubt
17 every element of the crime and that the party
18 is guilty as charged. This presumption of
19 innocence remains with the defendants all
20 through the case until, if ever, it is overborne
21 by proof which satisfies you beyond any reason-
22 able doubt that the presumption of innocence
23 no longer remains with them.

24 Thus, you look at all the evidence
25 introduced in this case and ask yourselves

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2 whether or not you are satisfied beyond a
3 reasonable doubt that the offenses have
4 been committed as charged in the indictment.
5 If you are so satisfied, then it will be
6 your plain duty to convict the defendant or
7 defendants who have committed the offenses.
8 But if there exists in your minds a reasonable
9 doubt of a defendant's or defendants' guilt,
10 you must give that defendant or defendants,
11 as the case may be, the benefit of that doubt
12 and acquit that defendant or defendants, as
13 the case may be.

14 In this case there is more than one
15 defendant, you must consider the innocence or
16 guilt of each defendant separately.

17 If there are two reasonable conclusions
18 equally supported by the evidence, one of which
19 is consistent with the guilt of a defendant
20 and the other consistent with his innocence,
21 then you must adopt that conclusion consistent
22 with his innocence and acquit him.

23 The question of reasonable doubt is
24 one which can be determined only by you. It
25 cannot be determined by arguments or opinion

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2 of counsel. In reaching a conclusion with
3 respect to reasonable doubt you must consider
4 all of the evidence together, not just a par-
5 ticular segment or portion of the evidence
6 isolated from the rest of the evidence.

7 The term "reasonable doubt" as used
8 in this charge does not mean just any possible
9 doubt you might have, but it means such reason-
10 able doubt as a careful, prudent and reasonable
11 man or woman ought to entertain in the circum-
12 stances proved. It means a doubt based on
13 reason, and which is reasonable in view of all
14 of the evidence. The key word is "reasonable."
15 A reasonable doubt may arise from the evidence
16 produced or from the lack of evidence in the
17 case. It is the obligation of the Government
18 to prove a defendant guilty beyond a reasonable
19 doubt but it is not required to prove a defendant
20 guilty beyond a shadow of a doubt. It is rarely
21 possible to prove anything to an absolute certainty
22 or beyond a possible doubt. Seldom can one prove
23 a controversial fact with mathematical certainty.
24 A reasonable doubt does not mean a vain, fanciful,
25 vague or whimsical or imaginary doubt, nor does

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2 it mean a possible doubt created by a reluc-
3 tance on the part of the jury to perform an
4 unpleasant task. It means a doubt arising
5 out of the evidence or lack of evidence
6 which is a reasonable doubt. A reasonable
7 doubt is a doubt that would cause prudent men
8 to hesitate before acting in matters of
9 importance to themselves. One is said to be
10 convinced in a case of this kind beyond a
11 reasonable doubt when, after an impartial
12 comparison and consideration of all the
13 evidence, one can conscientiously say that he
14 is convinced to a moral certainty of the truth
15 of the charge.

16 If there is a reasonable doubt in your
17 minds about the guilt of a particular defendant
18 on the charges in the indictment, he is entitled
19 to the benefit of that reasonable doubt and to
20 an acquittal on those charges. If, on the
21 other hand, you think a particular defendant's
22 guilt is clear beyond a reasonable doubt, then
23 you must find him guilty as charged. This is
24 true with respect to each and every defendant.

25 The machinery of trial calls for the

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exercise of varying functions by counsel, by the witnesses who testify, by the Court that presides and by the jury. You, as the jury, exercise the fact-finding function.

As you have been told, you are the sole judges of the facts. That is to say, it is you who must consider the evidence, weigh the evidence, and draw inferences from the evidence, but only from the evidence.

You must distinguish between the mere arguments of counsel which have been made before you and the evidence upon which the arguments rest. The repetition of an argument, however often, does not constitute evidence. You must carefully analyze the assertions which have been made to you by counsel for the defendants and counsel for the Government and ascertain what basis those assertions have in the evidence.

This brings us directly to the charges in the indictment itself.

The indictment, as you have been told, is not evidence in this case but I will read the indictment to you so you will understand the charges.

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2 GARY SINGLETON, WILLIAM M. KIRBY and
3 WILLIAM ELMORE have been charged with the
4 offense of having unlawfully in their possession
5 checks stolen from the United States mail. I
6 shall now read the indictment.

7 "The Grand Jury Charges: On or about
8 the 17th day of June 1974, within the Eastern
9 District of New York, the defendant GARY
10 SINGLETON, the defendant WILLIAM G. KIRBY and
11 the defendant WILLIAM ELMORE did unlawfully
12 have in their possession the following:

13 "1. American Express Travelers Check
14 No. FB68-370, payable to Lawrence Reed.

15 "2. State of New York check No.
16 42554393, payable to Samuels E L & E H, 130
17 46-145th Street, South Ozone Park, New York,
18 11436.

19 "3. State of New York check No.
20 98630020, payable to G. M. Conner, 133 11-145th
21 Street, South Ozone Park, New York, 11436.

22 "4. State of New York check No.
23 42578747, payable to Lewis-S & E, 126 22-145th
24 Street, South Ozone Park, New York, 11436
25 which were the contents of letters stolen from

1
2 the United States Mail, the defendants knowing
3 the same to have been stolen in violation of
4 Title 18, United States Code, Section 1708
5 and Section."

6 The pertinent portion of Section 1708
7 of Title 18 of the United States Code which
8 the Government claims was violated reads, in
9 substance, as follows:

10 "Whoever buys, receives, or conceals
11 or unlawfully has in his possession, any
12 letter, postal card, package, bag, or mail,
13 or any article or thing contained therein,
14 which has been stolen, taken, embezzled, or
15 abstracted, as herein described, from a Post
16 Office or mail receptacle knowing the same to
17 have been stolen, taken, embezzled or abstracted
18 shall be punished."

19 The elements of the offense as set forth
20 in Section 1708 of Title 18 of the United States
21 Code and charged in the indictment are (1)
22 unlawful possession of a letter or the contents
23 of a letter, which in this case were one
24 American Express Traverler's check and three
25 State of New York checks, which had been stolen

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2 or abstracted from a Post Office or a deposi-
3 tory of mail matter, and (2), knowledge by
4 the possessor that the letter or the contents
5 of the letter, which in this case were one
6 American Express Traveler's check and three
7 State of New York checks, were so stolen or
8 abstracted. Each of these elements of the
9 offense charged in the indictment will have
10 to be proved to your satisfaction beyond a
11 reasonable doubt as to the defendants before
12 they can be convicted.

13 The burden is upon the Government to
14 prove, beyond a reasonable doubt, these two
15 elements of the offense and failure to do so
16 is fatal to the prosecution and entitles the
17 defendants to a verdict of acquittal.

18 Now, we come to the violation of Title
19 18, Section 2. Section 2 of Title 18 of the
20 United States Code, referred to in the indict-
21 ment, places in the category of a principal
22 offender anyone who aids or abets an offender.
23 This section reads as follows, and I will quote.

24 "(a) Whoever commits an offense against
25 the United States or aids, abets, counsels,

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2 commands, induces or procures its commission,
3 is punishable as a principal.

4 "(b) Whoever willfully causes an act
5 to be done which if directly performed by
6 him or another would be an offense against
7 the United States, is punishable as a principal."
8 This section appears to be self-explanatory.

9 Thus, anyone who does not commit the
10 offense himself but who aids or abets an
11 offender or causes an act to be done which if
12 directly performed by him would be an offense
13 against the United States, is a principal. In
14 other words, anyone who shares in the criminal
15 intent of the principal and is willfully associ-
16 ated with the venture in a way that by his action
17 he will fully participate or assist in the
18 bringing about of the ultimate result, is,
19 under this section, in the same position as a
20 principal.

21 Now, as to aiding and abetting, again,
22 the burden is upon the Government to prove,
23 beyond a reasonable doubt, that (1) there was
24 an offense committed against the United States
25 by a principal and (2) the defendants willfully

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2
3 and knowingly aided and assisted in its
4 commission, and failure of the Government
5 to do so is fatal to the prosecution and
6 entitled the defendants to a verdict of
7 acquittal on this charge of aiding and
8 abetting.

9 Now, I hope you notice that I am
10 referring to each defendant separately.
11 They are not a package and you must take up
12 each one separately and see if he aided and
13 abetted as a principal.

14 I am not going to marshal the evidence
15 because this case was short and the evidence
16 should be fresh in your minds.

17 However, I think it would be helpful
18 if I gave you an outline of the Government's
19 contentions, of course, it won't be complete
20 with details.

21 The Government contends that on June 17,
22 1974, at about twelve noon, George Attmore, a
23 United States Post Office carrier, parked his
24 Post Office jeep containing packages of mail
25 for delivery on the northwest corner of 130th
Avenue and 146th Street, Queens, from which he

1
2 began to deliver mail on his last relay;
3 that shortly thereafter he noticed a green
4 Falcon motor vehicle with a black vinyl top
5 parked so close to his jeep that there was
6 no room for any person to walk between the jeep
7 and the Falcon car; that both cars were facing
8 south; that thereafter he observed two persons
9 sitting in the front seat of the Falcon car,
10 whom he identified as the defendant Singleton
11 and the defendant Kirby, and that he also
12 observed a third man who was standing close by
13 bending over to the driver's seat of the car
14 and who was subsequently identified by the
15 postal inspectors as the defendant William
16 Elmore; that after making his deliveries and
17 returning to the jeep, mailman Attmore discovered
18 a bag of approximately 500 letters missing from
19 the jeep and that the locks of the jeep had
20 been jimmied.
21

22 The Government further contends that
23 after Attmore notified his superior, postal
24 inspectors subsequently discovered the green
25 Ford Falcon sedan parked at Sutphin Boulevard
and 120th Avenue and followed it to 111th

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2 Avenue and Sutphin Boulevard at which time
3 they pulled parallel to the Falcon car at
4 an angle and ordered the occupants, whom
5 they identified as Singleton, Kirby and
6 Elmore, to leave the vehicle; that Elmore
7 and Kirby left the vehicle and Singleton did
8 not but instead drove the car off the curb
9 and away at a rate between 40, 50, and 60 miles
10 an hour and that as he left he threw out of
11 the car a jacket wrapped around an envelope
12 and certain checks which the Government claims
13 were stolen from Attmore's jeep; that Inspector
14 O'Neill chased Singleton in the green Falcon
15 car and subsequently caused him to stop and
16 thereafter arrested him; that Elmore and Kirby
17 were also arrested; and that Elmore denied
18 that the jacket belonged to him although when
19 he was brought to the Inspector's office, he
20 subsequently admitted that the jacket belonged
21 to him.
22

23 This is simply what I understand the con-
24 tentions of the Government to be.

25 On behalf of the Government, the following
took the stand: George Attmore, the postman on

1
2 duty; Philip L. Renzulli, a Postal Inspector;
3 and Allan J. O'Neill, a Postal Inspector.

4 I don't think there was anyone else
5 who took the stand for the Government.

6 The defendants, of course, pleaded
7 not guilty to this charge. On his own behalf,
8 the defendant William M. Kirby took the stand.
9 The other two defendants did not take the stand.

10 Now ladies and gentlemen, I wish to
11 make it clear that it is your recollection of
12 the evidence that will count in this case and
13 you must understand that the Court does not
14 express, and has not expressed, directly or
15 indirectly, subtly or otherwise, by intonation
16 or gesture, any opinion concerning any of the
17 facts that are involved in this case.

18 If, by implication or otherwise, I have
19 made reference to any testimony or evidence
20 which is not in accord with your recollection
21 disregard it because it is only your recollec-
22 tion of the facts, not mine, which will govern
23 in this case.

24 Now, let's talk about possession, which
25 is one of the chief elements contained in the

1
2 indictment.

3 The charge here is knowing possession
4 of stolen checks. That is possession with
5 knowledge that the checks were stolen. The
6 charge that all three of these men were in
7 possession of the stolen checks requires
8 some discrimination.

9 In the first place, we must think of
10 the kind of possession we are talking about.
11 There are two kinds. There is actual possession
12 and there is such a thing as constructive
13 possession which I will comment on.

14 In the second place, we must ascertain
15 who had possession -- all three or just one or
16 two of the defendants. Of course, if the
17 possession was not with knowledge that they
18 were stolen that ends the case. In the
19 third place, if only one or two, instead of
20 all three had possession, then did the defendant
21 or defendants who did not have possession aid
22 and abet the defendant or defendants who did
23 have possession? I know this is a little
24 complicated but let us try to make it simple.
25

When I am talking about possession or

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2 aiding and abetting, I am referring to
3 possession or aiding and abetting with
4 knowledge that the checks were stolen.
5 Knowledge is the key factor in this case.

6 In the first place, possession may
7 be actual physical possession of the stolen
8 checks or it could be constructive possession.
9 "Constructive possession" means that although
10 a defendant did not actually have in his hands,
11 physical possession of the stolen checks, his
12 relationship with the stolen checks or proximity
13 to them was such that he had dominion and con-
14 trol over the stolen checks either alone or
15 with others. In other words, the checks could
16 be in the car where all three could or could
17 not have control, although none of them have
18 them in their hands or even on their body.
19 But, they could have dominion and control
20 over them jointly. Under such circumstances,
21 it is said that persons have control over and
22 dominion over such stolen property. Dominion
23 and control are the key words to constructive
24 possession. It is possible for all three
25 defendants to have had either physical or

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2 constructive possession jointly of the
3 stolen checks. You may find that constructive
4 possession is present if you find beyond a
5 reasonable doubt that a particular defendant
6 had actual or constructive possession; that
7 is, dominion and control of the checks either
8 alone or jointly with the other defendants.

9 To sum up, the stolen checks could
10 have been in the joint physical or constructive
11 possession of all three defendants or only
12 two of the defendants or the stolen checks
13 could have been only in the physical or con-
14 structive possession of one of the defendants.
15 You will remember that all three were in the
16 car at one time.

17 If you find that the stolen checks were
18 in the joint physical or constructive possession
19 of all three defendants, then you need not
20 consider the question of aiding and abetting,
21 assuming that you find that it was in their
22 joint possession knowing that the checks were
23 stolen. If, however, you find that the posses-
24 sion, physical or constructive, of the stolen
25 checks was jointly held by only two of the

1
2 defendants or held by only one of the defen-
3 dants, then you may proceed to ascertain
4 whether the other one or two of the defendants
5 aided or abetted the remaining one or two,
6 as the case may be, in having or obtaining
7 knowing possession of the stolen checks.

8 Mere presence of a person at the place
9 where the checks were stolen is not sufficient,
10 without more, to charge that person with con-
11 structive possession of the stolen checks.
12 There must be some relationship by the defen-
13 dant or defendants as the case may be, with
14 the stolen checks. I am talking about con-
15 structive possession.

16 If you find that only one of the defen-
17 dants had knowing illegal possession of the
18 stolen checks, then you may ascertain whether
19 the other one or the other two aided and
20 abetted him in this knowing illegal possession
21 of the stolen checks. I must, therefore, in
22 this connection, instruct you that the mere
23 presence, without more, of any defendant or
24 defendants in the green Falcon car where there
25 may have been illegal possession of the stolen

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2 checks, is not sufficient to charge him or
3 them with aiding and abetting this illegal
4 possession. Moreover, mere presence in the
5 car and the knowledge by one or more of the
6 defendants that another defendant or defen-
7 dants was or were guilty of illegal possession
8 of the stolen checks is not sufficient to
9 charge him or them with aiding and abetting.
10 What I am trying to say to you is that presence
11 in the car in which someone has illegal posses-
12 sion of stolen checks is not sufficient even
13 though he knew someone did have in his possession
14 illegally stolen checks. I must also state to
15 you that, if you find that one defendant had
16 knowing illegal possession of the stolen checks
17 and one or two of the other defendants associated
18 him or themselves with the venture and if they
19 became closely associated with the venture, so
20 that, in fact, they were really participants in
21 the illegal possession of the stolen checks,
22 knowing them to be stolen and seeking by their
23 very actions to make the illegal possession a
24 successful illegal possession, then you may,
25 if such facts are proven beyond a reasonable

1
2 doubt, find them guilty of aiding and abetting
3 the illegal possession.

4 Possession of property recently stolen,
5 if not satisfactorily explained, is ordinarily
6 a circumstance from which the jury may reason-
7 ably draw the inference and find, in the
8 light of surrounding circumstances shown by
9 the evidence in the case, that the person in
10 possession knew the property had been stolen.

11 From the circumstances of this case,
12 it would seem to be clear that the property
13 that, these checks, were recently stolen.
14 You may find that there are other circumstances
15 in the case which would justify an inference
16 that the person who possessed the stolen property
17 did not know that the property was stolen.

18 It is the exclusive province of the jury
19 to determine whether the facts and circumstances
20 shown by the evidence in the case warrant any
21 inference which the law permits you to draw
22 from possession of recently stolen property.
23 If any possession the accused may have had of
24 recently stolen property is consistent with
25 innocence, of if you entertain reasonable doubt

1
2 of guilt, you must acquit the accused.

3 Now, what is knowledge? To be found
4 guilty it must be shown that the defendants
5 had knowledge that the checks were stolen.

6 "Knowledge" is descriptive of a state
7 of mind and, as an element of the offense is
8 seldom, if ever, susceptible of direct proof.
9 As you know, we cannot physically look into
10 a person's mind. The proof of this element of
11 knowledge may rest, as it frequently does, on
12 evidence of facts and circumstances from which
13 it clearly appears as the only reasonable and
14 logical inference that the accused had knowledge
15 of the illegal possession of the stolen checks.
16 No person can intentionally avoid knowledge by
17 closing his eyes to the facts that would lead
18 a reasonable man to investigate. However, a
19 mere suspicion that something is wrong or
20 improper is not equivalent to knowledge. On
21 the other hand, knowledge may be inferred from
22 the acts of the party and is a question of fact
23 to be determined from all the circumstances,
24 and the jury may scrutinize the defendant's
25 entire conduct at the time the offenses alleged

1
2 were committed. The circumstantial evidence
3 sufficient to support a charge of knowledge
4 of illegal possession of stolen checks must
5 be sufficiently persuasive, however, as to
6 exclude the inference of innocence.

7 Now, in this case, as you remember,
8 according to the testimony, Gary Singleton
9 did not get out of the car when ordered to
10 do so by the inspectors but instead immediately
11 drove the car over the curb and sped away and
12 was chased by Inspector O'Neill. You remember
13 that testimony as well as I.

14 Flight does not necessarily reflect
15 feelings of guilt. There are many motives which
16 might prompt flight. You are not to presume
17 guilt from flight alone by the defendant. You
18 may, but need not, consider flight as one of
19 the circumstances tending to show feelings of
20 guilt; and you may, but need not, consider
21 feelings of guilt as evidence tending to show
22 actual guilt.

23 As you will recall, the defendant William
24 Elmore denied that the jacket thrown out of the
25 green Falcon car by Singleton belonged to him,

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2 although he subsequently, at the post office,
3 admitted that it did belong to him. The
4 denial was an exculpatory statement and when
5 an exculpatory statement by a defendant is
6 proven to be false, such exculpatory statement
7 is circumstantial evidence of a guilty con-
8 science and has certain independent probative
9 value. It is simply a circumstance from which
10 the jury may, but is not compelled to, infer
11 that Elmore had a guilty conscience.

12 The Government's case against the
13 defendants rests on both direct and circum-
14 stantial evidence.

15 As to the subject of circumstantial
16 evidence, I'd like to say a word. Circumstan-
17 tial evidence is evidence of one fact from
18 which you may reasonable infer the existence
19 or non-existence of another fact.

20 I give this example from time to time,
21 in my charge, on circumstantial evidence. For
22 example, if a person comes into your home wearing
23 a raincoat which is wet, carrying an umbrella
24 which is wet, that would be circumstantial
25 proof that it is raining outside even though

1
2 you did not otherwise know it was raining.

3 Or, to give you another illustration,
4 perhaps a little closer to home here in the
5 courtroom, suppose a member of the jury were
6 to ask Mr. Nims, who is the Court Clerk, for
7 a pad and a pencil to make notes and suppose
8 that after you took your recess you came back
9 and Ms. Ginsberg, the Court Reporter, not the
10 Clerk to whom the member of the jury first
11 spoke, were to hand the juror a pad of paper
12 and a pencil, that would be circumstantial
13 evidence that Mr. Nims had given the juror's
14 message directly to Ms. Ginsberg.

15 As the words indicate, circumstantial
16 evidence means evidence involving circumstances
17 surrounding the incident and details as distin -
18 guished from direct personal observation. It
19 is more than, and fundamentally different from,
20 mere conjecture or surmise; for under our law
21 no man is to be convicted on the basis of guess-
22 work or speculation.

23 An inference that is reasonable drawn
24 from the facts testified to is evidence. A
25 logical inference is to be distinguished from

1
2 sheer speculation or mere suspicion. When
3 two inferences may be drawn from a proven
4 fact, one consistent with guilt and one
5 consistent with innocence, equally consistent,
6 you must draw the inference of innocence.

7
8 Circumstantial evidence is legal and
9 it is acceptable evidence. It is that evidence
10 which tends to prove a disputed fact by proof
11 of other facts which have a legitimate ten-
12 dency to lead the mind to a conclusion that
13 the fact exists which is sought to be estab-
14 lished. Circumstantial evidence may consist
15 of an accumulation of many details which are
16 so logically interrelated and so consistent
17 with each other, and so inherently proable,
18 that you may not have the slightest doubt as
19 to its truthfulness and its accuracy.

20 The circumstantial evidence must, how-
21 ever, be so convincing that it leaves you with
22 no reasonable doubt. If you have a reasonable
23 doubt after you consider all the circumstantial
24 and other evidence as to any defendant, you
25 must acquit that particular defendant.

In this case the defendant Kirby

1 testified in his own behalf. A defendant
2 who wishes to testify is a competent witness,
3 and his testimony should not be disbelieved
4 merely because he is a defendant. However,
5 in weighing his testimony, you may consider
6 the fact that the defendant has a vital
7 interest in the outcome of this trial. And
8 you may also consider and take into account
9 the probabilities or improbabilities of the
10 defendant's stories.
11

12 The other two defendants did not take
13 the stand. The law does not compel a defendant
14 in a criminal case to take the witness stand
15 and testify, and no presumption of guilt may
16 be raised and no inference of any kind may be
17 drawn from the failure of a defendant to testify.
18

19 As stated before, the law does not
20 impose upon a defendant in a criminal case the
21 burden or duty of calling any witnesses or
22 producing any evidence, or taking the stand.

23 Now, a word about credibility of a
24 witness. You heard and have seen, I think,
25 a total of four witnesses who took the stand.
In considering the evidence you exercise the

1
2 exclusive function of passing upon the
3 credibility of the witnesses. Now, you
4 can see that this is a very important
5 function, because to determine where the
6 truth lies you must of necessity decide who
7 is telling the truth. How you are to do this
8 is left to your own determination. Among other
9 things, in determining the credibility of a
10 witness, the jury may consider his motive in
11 testifying, his manner and demeanor on the
12 witness stand, his interest, prejudice or
13 bias, if any, whether he has a purpose or
14 interest to serve which might color his testi-
15 mony. Interest does not necessarily mean that
16 a witness is untruthful. It is merely an
17 element that you may consider in reaching your
18 determination upon the question of whether he
19 is telling the truth. You consider the wit-
20 ness's demeanor; to use a colloquial expres-
21 sion, you "size him up" when he tells you
22 anything, and you decide whether he strikes
23 you as a fair and candid witness or whether
24 the witness strikes you as a person who is not
25 telling the truth either intentionally or

1
2 unintentionally.

3 You may also consider whether a
4 witness had the means of knowing what he
5 was testifying to, and also the inherent
6 probability of his testimony, the consistency
7 or inconsistency of his statements and the
8 reasonableness or unreasonableness of his
9 testimony viewed in the light of all of the
10 circumstances surrounding that testimony.

11 You may consider also whether or not the witness
12 has been contradicted by other credible evidence
13 and whether or not he has made statements at
14 other times and places, under oath and other-
15 wise, which contradicted or are contrary to
16 those made by him on the witness stand.

17 As to the latter, you should consider
18 whether any prior inconsistent or contradictory
19 statements conflict with the testimony given
20 by the witness with respect to material or
21 immaterial matters and to what extent, if any,
22 they should be considered to effect the wit-
23 ness' credibility.

24 The jury is not bound to believe inher-
25 ently improbable or unreasonable statements

1
2 just because the witness who made them
3 was under oath.

4 The jury, as I said before, has a
5 right in appraising a particular witness'
6 credibility, as to all or part of his testi-
7 mony, to consider the probability or improb-
8 ability of that testimony when viewed in the
9 light of all of the circumstances and other
10 evidence in this case.

11 Now, if you find that any witness has
12 knowingly testified falsely to a material
13 fact, you may disregard the entire testimony
14 of that witness or you may accept that which
15 you believe to be true and disregard the balance.
16 If you disregard the testimony of the witness
17 altogether and the guilt of any defendant is
18 dependent upon such testimony, then you must
19 acquit such defendant.

20 It will be for you to determine whether
21 a witness, whoever he may be, is telling the
22 truth as to all the facts or only with respect
23 to some of the facts. The test as to whether
24 you believe a witness is the same test which
25 you apply in your everyday business or in your

1
2 home affairs, where you are called upon
3 to make a similar determination. Do not
4 think, members of the jury, that when you
5 came into this jury box and were sworn as
6 jurors that it was supposed that you would
7 lay aside your business or everyday experience.
8 That is not so. You are now being called upon,
9 indeed, to use that business or everyday exper-
10 ience to assist you in determining any conflict
11 in evidence in this case.

12 In this case, you will remember, there
13 is direct conflict in the evidence between
14 the mailman, Attmore, and the defendant, Kirby.
15 Someone, in that respect, is not telling the
16 truth and it will be up to you to ascertain
17 who is telling the truth. You are the exclusive
18 judges in determining where the truth lies.

19 You have been chosen and sworn as jurors
20 in this case to try the issues of fact presented
21 by the allegations of the indictment and the
22 denial made by the "Not Guilty" plea of each
23 of the defendants accused. You are to perform
24 this duty without fear and without bias or
25 prejudice or sympathy as to any party. The law

1
2 does not permit jurors to be governed
3 by fear, sympathy, prejudice or public
4 opinion. You must not permit any plea of
5 sympathy to enter your verdict. The accused
6 and the public expect that you will carefully
7 and impartially consider all the evidence,
8 follow the law as stated by the Court and
9 reach a just verdict, regardless of the
10 consequences.

11 In conclusion, let me say that it
12 is your duty to weigh the evidence carefully,
13 dispassionately, calmly, and to reach a con-
14 clusion about the case as to the facts which
15 are wholly within your finding.

16 The only question for your considera-
17 tion is whether the defendant or defendants
18 are guilty or innocent of the offense for
19 which he and they are on trial. If you are
20 satisfied beyond a reasonable doubt that a
21 defendant is guilty, it is your plain duty
22 to convict him. If you have a reasonable
23 doubt about the matter, it is equally your
24 duty to acquit him. Each defendant, as I
25 said before, must be considered separately

1
2 and you determine the guilt or innocence
3 of each one separately.

4 The punishment provided by law is
5 a matter exclusively within the province of
6 the Court. You cannot and you should not
7 allow consideration of any punishment which
8 may be imposed upon any defendant in case he
9 is found guilty, to influence you in arriving
10 at an impartial verdict as to his guilt or
11 innocence.

12 It will be for the Court to determine
13 any mitigating or any other special circumstances
14 which may require consideration in the case, so
15 you should not be concerned with the question
16 of punishment.

17 Now, Ladies and Gentlemen, as you perhaps
18 know, all twelve of you must agree, whichever
19 way you find. In other words, your verdict
20 must be unanimous. You must take this indictment
21 and you must determine the guilt or innocence
22 of each defendant with respect to this one count.
23 The form of your verdict should be:

24 "We, the jury, find the defendant Gary
25 Singleton not guilty as charged" or "We, the

1
2 jury, find the defendant Gary Singleton
3 guilty as charged."

4 You do the same with respect to William
5 M. Kirby and William Elmore. "We, the jury,
6 find the defendant William M. Kirby guilty
7 as charged" or "We, the jury, find the defen-
8 dant William M. Kirby not guilty as charged.
9 We, the jury, find the defendant William Elmore
10 guilty as charged" or "We, the jury, find the
11 defendant William Elmore not guilty as charged."

12 If you wish any testimony of any witness
13 to be read to you, or if you have any further
14 questions, please send a note to the Marshal
15 who will relay your request to me.

16 As I said at the beginning, I know that jury
17 service is not always pleasant and I know it is
18 rarely convenient. However, jury service is
19 one of the keystones of our system of American
20 justice and democratic government. I want to
21 thank each and every one of you for your out-
22 standing devotion, as citizens, to your important
23 work as jurors.

24 May you, acting in accordance with the
25 evidence and the law, by your verdict declare

2 the truth and proclaim the cause of
3 righteousness and justice.

4 If you desire to examine any of the
5 exhibits, they will be delivered to you
6 upon request and if after you have retired
7 you desire to be informed on a point of law
8 arising in the case or to have any part of
9 the testimony clarified, give a note to the
10 Marshal and you will be brought back into
11 the court.

12 At this point we will take a five
13 minute recess in order that I may go over
14 my instructions with counsel. Do not discuss
15 the case at this point. You are not to dis-
16 cuss the case untill the five minute recess
17 is over and I call you back.

18 (Jury excused at 4:30 p.m.)
19

CERTIFICATE OF SERVICE

7/23/75, 19

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

E. Thomas Boyle